



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: First Federal Corporation

File: B-245891

Date: February 10, 1992

Paralee White, Esq., and Andrew Mohr, Esq., Cohen & White, for the protester.

Janice M. Bellucci, Esq., and O. Kevin Vincent, Esq., for DataVault Corporation, an interested party.

Eileen Ginsburg, Esq., Department of the Army, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a quoter under a small purchase solicitation failed to provide certification from a licensed engineer that its vault met all of the material requirements necessary to protect the storage of classified information on magnetic media as required by the solicitation, the procuring agency's award of the purchase order to that quoter and the agency's decision to allow performance under the order were improper.

DECISION

First Federal Corporation protests the award of a purchase order to DataVault Corporation under request for quotations (RFQ) No. MDA903-91-Q-0115, issued by the Defense Supply Service-Washington (DSS-W), Washington, D.C., for storage of computer media. First Federal contends that DataVault's storage facility did not meet certain mandatory requirements of the RFQ.

We sustain the protest.

On August 15, 1991, DSS-W issued this RFQ under small purchase procedures to obtain a contractor to furnish the necessary personnel, materials, and facilities to provide transportation and storage of classified and unclassified

computer media. Paragraph II.B entitled "Facility" of the statement of work included the following requirements:

"At the time of the order, the vendor will have an approved vault clearance for storage of TOP SECRET data. The vault is to meet Class A vault construction standards for TOP SECRET Department of Defense data [and] is to have a welded steel lined, ferromagnetic shield on all six sides per NBS [National Bureau of Standards] Technical Note 735. Certification of a licensed engineer [or] architect, that the specific facilities to be used meet all of these standards required, is to be provided by the vendor."

On August 16, DSS-W received quotes from DataVault and First Federal in response to the RFQ. DataVault submitted the low quote and thus DSS-W placed a purchase order with DataVault on September 6. After learning of the order, First Federal contacted DSS-W on September 11 to question whether DataVault's quotation contained the required certification, since it believed that DataVault's facility did not meet the RFQ requirements. At this time, DSS-W discovered that the certification had not been provided by DataVault and it so informed First Federal. DSS-W then requested DataVault to provide the certification, which DataVault submitted on September 12. Based upon additional concerns regarding the adequacy of the certification, DSS-W requested a second certification from DataVault, which was provided on September 19. On that same day, DSS-W determined that DataVault's certifications were sufficient and authorized DataVault to commence performance under the purchase order. On September 26, First Federal filed this protest against the award. DSS-W has withheld performance under the contract pending our decision in the matter.

The crux of First Federal's protest is that DataVault failed to comply with the RFQ's requirement to provide a certification from a licensed engineer certifying that DataVault's vault met all of the standards required by the RFQ. First Federal maintains that while DataVault has provided certifications from a licensed engineer, the engineer did not certify the vault to be welded, steel lined, and ferromagnetic shielded on all six sides per NBS Technical Note 735.

DSS-W initially challenges the timeliness of the protest because First Federal did not file the protest within 10 working days of September 11, when First Federal was apprised of the order. On that date, DSS-W advised First Federal that DataVault had failed to submit the required certification. The agency also pointed out that the issuance of the purchase order did not itself result in a

binding contract, but simply was the government's offer that would not become a contract until the supplier accepted the offer, which in small purchases is normally accepted by commencement of performance. See Federal Acquisition Regulation § 13.108. The agency stated that it would obtain the necessary certification before allowing performance.

Since DSS-W advised First Federal that it would not authorize performance until it obtained the appropriate engineer's certification from DataVault, we think that First Federal was entitled to await the government's receipt and review of the certification before it was required to protest. See Liebert Corp., 70 Comp. Gen. 448 (1991), 91-1 CPD ¶ 413. Inasmuch as DSS-W only approved the certification on September 19, First Federal's September 26 protest of the sufficiency of the certification was timely filed within 10 working days of being apprised of its basis for protest.

The RFQ required the contractor to provide certification that the facilities to be used met all of the standards specified by the RFQ. The certification documents submitted by DataVault and a letter from an independent testing facility submitted by DataVault after the protest was filed show that DataVault's facility was certified as having ferromagnetic shielding on all six sides of the vault. None of these documents certifies that the vault had a welded steel lined ferromagnetic shield on all six sides per NBS Technical Note 735, as required by the RFQ, and neither DSS-W nor DataVault has provided any evidence that the offered vault has a welded steel lined ferromagnetic shield on all six sides or that this shield is in conformance with NBS Technical Note 735.¹

According to the affidavit of a physics professor from George Washington University provided by First Federal, the above requirements are necessary to prevent damage and destruction to information stored on magnetic media caused by static magnetic fields.² That is, the purpose of this ferromagnetic shielding is to prevent the destruction of magnetic storage media, such as the items that are to be stored under this contract, by exposure to static magnetic

¹DataVault has only argued that it meets all RFQ requirements without expressly addressing those at issue.

²Static magnetic fields, which destroy magnetic media, can be created by an instrument as common as a magnet.

sources in proximity to the vault. This expert states that without a continuous, solid shield as required by NBS Technical Note 735, the vault may not effectively provide the required protection, and that from his review of DataVault's literature he believes that the firm's vault did not meet the RFQ requirements.

DSS-W does not dispute that these requirements are material and necessary to meet the government's requirements. Instead, DSS-W argues that the certification that DataVault provided was adequate and that the actions of the agency were reasonable.

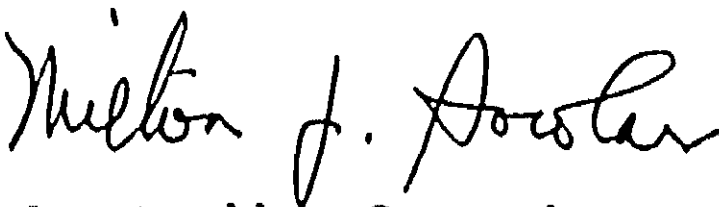
We do not agree that the agency's actions were reasonable. The certification requirement clearly stated that "all" standards of the "Facility" paragraph had to be certified by an engineer. The certifications supplied by DataVault do not indicate that its vault has a welded steel lined ferromagnetic shield on all six sides per NBS Technical Note 735; these certifications only state that the vault has ferromagnetic shielding on all six sides.³ Thus, it is clear from the record that a purchase order was issued to DataVault and contract performance was authorized without DataVault's ever having provided an adequate certification indicating compliance with all RFQ requirements. Given the apparent material nature of this certification requirement, we find that DSS-W's issuance of the order to DataVault and decision to allow performance under the order was improper.

We sustain the protest.

We recommend that DSS-W reevaluate its minimum requirements in order to determine the exact features required of the vault. If DSS-W determines that the vault is not required to have welded steel lined ferromagnetic shielding on all six sides per NBS Technical Note 735, then the RFQ should be amended and the requirement recompeted. On the other hand, if the requirements are necessary to meet the government's minimum needs, the purchase order should be awarded to First Federal, assuming that it meets these requirements. Under the circumstances, First Federal is entitled to recover its

³The specific allegation that DataVault's vault did not have these specific characteristics was expressly brought to DSS-W's attention before it obtained and reviewed the certificates.

costs of filing and pursuing the protest, including reasonable attorneys' fee. 4 C.F.R. § 21.6(d)(1) (1991). First Federal should submit its costs directly to the agency within 60 working days of receipt of this decision. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(f)(1)).

for 
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